Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Cross-Petitioners,

v.

WHEELING and LAKE ERIE RAILWAY COMPANY,

Cross-Respondent.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Eleventh Amendment bar enforcement of 49 U.S.C. § 11501 against the States because Congress enacted the statute pursuant to the Commerce Clause?

LIST OF PARTIES

The parties to the proceeding below in addition to those listed in the caption of this cross-petition were Scott Township and James P. Mulligan, Chairman of the Board of Supervisors of Scott Township. Scott Township and James P. Mulligan were separate appellants in the court below.

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No. ———

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Cross-Petitioners,

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WHEELING and LAKE ERIE RAILWAY COMPANY,

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Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Pennsylvania Public Utility Commission, and individual commissioners of that commission, cross-petitioners herein, petition for a writ of certiorari to review the judgment of the United States Court of Appeals

for the Third Circuit entered in this case on March 31, 1998, the Court of Appeals denying rehearing on April 15, 1999. The Pennsylvania Public Utility Commission and individual commissioners, cross-petitioners herein, pray that the writ for certiorari should issue, however, only in the event that this court grants the petition for writ of certiorari at No. 99-86, this term.

REFERENCE TO OPINIONS DELIVERED IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Third Circuit in *Wheeling and Lake Erie v. Public Utility Commission of the Commonwealth of Pennsylvania, et al.*, is reported at 141 F.3d 88.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its opinion in *Wheeling and Lake Erie Railroad Company v. Commonwealth of Pennsylvania, Public Utility Commission*, on March 31, 1998. The Court of Appeals for the Third Circuit denied rehearing by order entered April 15, 1999. The Commission files this conditional petition for a writ of certiorari pursuant to Rule 12.5 in response to the petition for writ of certiorari filed July 12, 1999 at No. 99-86 this term. This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Statute at 49 U.S.C. § 11501(b)(4) states as follows:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a state, subdivision of a state, or authority acting for a state or subdivision of a state may not do any of them:

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of 49 U.S.C. § 11501(b)(4), an Act of Congress affecting the public interest and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

The United States Court of Appeals for the Third Circuit has, pursuant to 28 U.S.C. § 2403(a), previously certified to the Attorney General of the United States the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE

This case began when the Pennsylvania Public Utility Commission (Commission) entered an Order on September 23, 1994 at Docket No. C-00823227 pursuant to 66 Pa. C.S. §§ 2702 and 2704, allocating the cost of construction of and assigning maintenance responsibility for the new highway bridge carrying Old Bower Hill Road over the facilities of the Wheeling and Lake Erie Railway Company in Scott Township, Allegheny County. The September 23, 1994 Order directed Wheeling and Lake Erie Railway Company to pay Scott Township three percent of the total construction costs incurred by Scott Township in replacing the highway bridge carrying Old Bower Hill Road over the facilities of Wheeling and Lake Erie Railway Company and Consolidated Rail Corporation. The Commission order allocated the remaining construction costs to the Pennsylvania Department of Transportation (seven percent), Consolidated Rail Corporation (three percent), and Scott Township (eighty seven per-

cent). The Commission Order also directed that the Wheeling and Lake Erie Railway Company pay Scott Township fifteen percent of the costs which Scott Township would incur maintaining the structure in the future. The Commission Order allocated the remaining maintenance costs between Conrail (fifteen percent) and Scott Township (seventy percent).

Wheeling and Lake Erie Railway Company filed a complaint in the United States District Court for the Western District of Pennsylvania against the Commission, the individual Commissioners, Scott Township, and James P. Mulligan, Chairman of the Board of Commissioners of Scott Township on October 20, 1994. The complaint alleged that the Commission Order of September 23, 1994 was a tax and was discriminatory pursuant to 49 U.S.C. § 11503(b)(4), now recodified at 49 U.S.C. § 11501 (b)(4). For purposes of clarity and consistency, this petition will refer to this statutory provision as 49 U.S.C. § 11501(b)(4).

On October 11, 1996, the District Court granted Wheeling and Lake Erie Railway Company's Motion for Summary Judgment, determined the Commission's order to be a discriminatory tax and issued an order enjoining the Commission from collecting any costs associated with the construction or maintenance of the Old Bower Hill Road Bridge from Wheeling and Lake Erie Railway Company. The Commission appealed the District Court's Order to the United States Court of Appeals for the Third Circuit. On appeal, the Commission raised the issue of its immunity from suit pursuant to the Eleventh Amendment in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). On March 31, 1998, the Court of Appeals issued a decision reversing the District Court, determining that the Commission's Order was not a tax within the meaning of 49 U.S.C.

§ 11501. The Court of Appeals also found that 49 U.S.C. § 11501 was validly enacted pursuant to Section 5 of the Fourteenth Amendment. Thus, the Court of Appeals held that the Eleventh Amendment did not bar the District Court from hearing the matter.

Wheeling and Lake Erie Railway Company filed a petition for writ of certiorari with this Court on July 14, 1999 at No. 99-86, this term. The Commission and individual Commissioners, file this conditional cross-petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari Because the Court of Appeals' Determination That Congress Validly Enacted 49 U.S.C. § 11501, Prohibiting Discriminatory Taxation of Railroads, Pursuant to Section 5 of the Fourteenth Amendment Is Contrary to the Decisions of This Court That Have Held That Discriminatory Taxation of Railroads Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

This case addresses the issue of whether States are subject to suit in federal courts under 49 U.S.C. § 11501. The Commission contends it is immune from suit under the Eleventh Amendment because Congress enacted 49 U.S.C. § 11501 pursuant to the Commerce Clause.

A. History of 49 U.S.C. § 11501

Congress enacted 49 U.S.C. § 11501 as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act). Congress found when it enacted 49 U.S.C. § 11501, that the States overtaxed railroads and that the States' discriminatory taxation of railroads constituted an undue burden on interstate commerce. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission,* 481 U.S. 454 (1987).

Since Congress enacted 49 U.S.C. § 11501, railroads nationwide have successfully used it to enjoin numerous States from enforcing discriminatory taxes against railroads. *Burlington Northern Railroad Co. v. Bair,* 766 F.2d 1222 (8th Cir. 1985) (personal property tax); *Alabama Great Southern Railroad Co. v. Eagerton,* 663 F.2d 1036 (11th Cir. 1981) (gross intrastate receipts tax), *Burlington Northern Railroad Co. v. City of Superior,* 932 F.2d 1185 (7th Cir. 1981) (ore dock tax). The Courts of Appeals have held that the States were subject to suit pursuant to 49 U.S.C. § 11501 in federal courts, that 49 U.S.C. § 11501 applies to a wide variety of discriminatory state taxes and that the federal courts could enjoin discriminatory State taxation of railroads. Recent decisions of this Court call into question the railroads' ability to subject States to suit in federal courts pursuant to 49 U.S.C. § 11501.

B. Recent Eleventh Amendment Decisions

In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996) this Court overruled its decision in *Pennsylvania v. Union Gas Company,* 491 U.S. 1 (1989) and held that Congress could not abrogate state sovereign immunity under the Eleventh Amendment using the Commerce Clause. This court reasoned that since the Commerce Clause, as part of the Constitution, was subject to the Eleventh Amendment, Congress could not use the Commerce Clause to override State sovereign immunity based on the Eleventh Amendment. *Seminole* left intact only limited prospective relief against individual state officials under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908) where Congress enacted legislation pursuant to the Commerce Clause.

This Court in *Seminole* ruled that Congress could abrogate State sovereign immunity under the Eleventh Amendment using Section Five of the Fourteenth Amend-

ment. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). This Court reasoned that the Fourteenth Amendment specifically allowed Congress to enact legislation that would protect individual constitutional rights against state action and therefore could be used to abrogate state sovereign immunity. After *Seminole,* plaintiffs seeking relief from States in federal court alleged that the statute they were proceeding under was enacted by Congress pursuant to the Fourteenth Amendment.

This Court in *City of Boerne v. Flores,* 521 U.S. 507 (1997) held that Congress could enact legislation pursuant to the Fourteenth Amendment only where it was seeking to enforce existing constitutional rights. This Court found that the Fourteenth Amendment was only remedial and did not grant Congress the authority to create new constitutional rights via statute. Only this Court could determine the substance of the Constitutional rights that Congress could enforce. After *Boerne* and *Seminole,* plaintiffs seeking relief from States in federal courts could do so only if they could demonstrate that Congress enacted the statute they were proceeding under pursuant to the Fourteenth Amendment and that the statute enforced existing constitutional rights.

Since this court decided *Seminole,* several States have raised Eleventh Amendment sovereign immunity in response to suits brought against them pursuant to 49 U.S.C. § 11501. In *Union Pacific Railroad Company v. Burton,* 949 F. Supp. 1546 (D. Wy. 1996), the District Court ruled that Wyoming was immune from suit. After reviewing the legislative history of the 4R Act and 49 U.S.C. § 11501, the Court concluded that the statute had been enacted pursuant to the Commerce Clause. The Court also found that there was no evidence in the legislative history that the statute had been enacted to enforce constitutional rights under the Fourteenth Amendment.

Therefore, the Eleventh Amendment barred suit against the State of Wyoming, although not against individual state officials.

In *CSX Transportation, Inc. v. Board of Public Works,* 138 F.3d 537 (4th Cir. 1998), *cert. denied,* 119 S. Ct. 63 (1998), the Court of Appeals did not address the issue of State sovereign immunity from suits brought pursuant to 49 U.S.C. § 11501 but rather held that the District Court could enjoin individual state officials under *Ex Parte Young* and that such relief was complete. The Court refused to address the issue of whether Congress enacted 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment.

In *Oregon Short Line Railroad v. Department of Revenue,* 139 F.3d 1259 (9th Cir. 1998) the Court of Appeals ruled that Congress enacted 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment. The Court of Appeals stated that Congress was concerned about tax discrimination against railroads when it enacted 49 U.S.C. § 11501 and that the statute enforced the equal protection clause of the Fourteenth Amendment. The Court held that the statute is consistent with the Constitution, is adapted to its ends and does not provide remedies that are disproportionate to the goal of eliminating discrimination. The Court concluded that the Eleventh Amendment did not bar suit against the State of Oregon.

In this case, the Court of Appeals addressed the issue of whether Congress enacted 49 U.S.C. §11501 pursuant to the Fourteenth Amendment and thus whether the Eleventh Amendment barred suit against the Commonwealth of Pennsylvania. In its review of 49 U.S.C. § 11501, the Court of Appeals observed that the statute stated it was enacted because of Congress' concern that discriminatory taxation of railroads burdened interstate

commerce. Thus, it was clear that Congress enacted the statute pursuant to the Commerce Clause. However, the Court of Appeals also stated that in determining the sources of Congress' authority to legislate, it could look beyond the expressed constitutional basis in the statute. 141 F.3d at 92.

The Court of Appeals then held Congress validly enacted 49 U.S.C. § 11501 pursuant to Section Five of the Fourteenth Amendment because it was concerned with discrimination against railroads in violation of their equal protection rights under the Fourteenth Amendment. 141 F.3d at 93. The Court stated that Congress intended that the statute enforce the equal protection clause of the Fourteenth Amendment. It also found Congress had the discretion to determine that railroads need special protection from tax discrimination. The Court held that the remedies provided by the statute were not out of proportion to their objective. Finally the Court concluded that 49 U.S.C. § 11501 did not substantively change any constitutional protections. The Court of Appeals' ruling on this issue is contrary to previous rulings of this court.

C. Discriminatory Taxation of Railroads Does Not Violate the Fourteenth Amendment.

Before Congress enacted 49 U.S.C. § 11501, this Court ruled that discriminatory taxation of railroads did not violate the equal protection clause of the Fourteenth Amendment. *Nashville, Chattanooga and St. Louis Railway v. Browning*, 310 U.S. 362 (1940). In that case, this Court held that a State taxing railroads at a higher rate than other taxpayers did not violate the equal protection clause of the Fourteenth Amendment. This Court held that States may classify property for taxation, may tax classes of taxpayers at different rates and may treat railroads and other utilities differently from other tax-

payers. This Court concluded that these kinds of tax schemes did not violate the Fourteenth Amendment. 310 U.S. at 368-369. This Court has not overruled or otherwise reversed its ruling in *Browning*. The ruling is controlling on this issue now and would have been controlling when Congress enacted 49 U.S.C. § 11501.

Therefore, when Congress enacted 49 U.S.C. § 11501, it was not attempting to prevent unconstitutional discrimination. Congress is presumed to have been aware of this Court's determination in *Browning* and the cases cited in *Browning* that discriminatory taxation of railroads by States did not violate the equal protection clause of the Fourteenth Amendment. *Goodyear Atomic Corporation v. Miller,* 486 U.S. 174 (1998). Congress could create new statutory rights under the Commerce Clause but it could not have enacted 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment to remediate unconstitutional discrimination when this Court had already held that discriminatory taxation against railroads was constitutional. Congress failed to identify State conduct violating the Fourteenth Amendment's substantive provisions and could not have devised any scheme to prevent that conduct because the States' discriminatory taxation of railroads did not violate the equal protection clause. *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank,* —— U.S. —— 119 S. Ct. 2219 (1999).

In order for Congress to enact 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment, it would have to change the substantive constitutional rights of railroads regarding tax discrimination. This Court has ruled in *Boerne* that Congress cannot enforce constitutional rights under the Fourteenth Amendment by changing the substance of those rights. In *Boerne,* this Court held that

Congress can only enact legislation pursuant to Section 5 of the 14th Amendment to enforce existing constitutional rights as determined by this Court. Congress cannot independently define or expand the scope of those constitutional rights by statute.

This is where the Courts of Appeals in both *Oregon Short Line* and this case are wrong. Both mistake what is a substantive change in constitutional rights for a remedial statutory enforcement of existing constitutional rights. The Court in *Oregon Short Line* cited *Browning* and stated that some of the practices prohibited by 49 U.S.C. § 11501 might have been sustainable against equal protection challenge but then held that Congress could eliminate all railroad discrimination even if it eliminated more practices than this Court would have. 139 F.3d at 1267. This reasoning is an admission that Congress has statutorily enforced constitutional rights under the Fourteenth Amendment by changing the substance of those rights.

The Court in this case does not cite *Browning* or any of the cases cited in *Browning*. Rather, the Court cites *Boerne* and concludes that *Boerne* does not affect its result. The Court states that 49 U.S.C. § 11501 does not substantively change any constitutional protections. 141 F.3d at 94. This statement occurs one page after the Court quotes another Court of Appeals' statement that prior to the passage of 49 U.S.C. § 11501, States could constitutionally classify railroads differently from other taxpayers without violating the equal protection clause of the Fourteenth Amendment. Again, this is an acknowledgment that Congress has statutorily enforced a constitutional right under the Fourteenth Amendment by changing the substance of that right. This Court's decision in *Boerne* renders legislation attempting to change the substance of constitutional rights under the Fourteenth Amendment unconstitutional.

In direct contradiction to *Boerne*, by finding that Congress enacted 49 U.S.C. § 11501 pursuant to Section 5 of the 14th Amendment, the Court of Appeals held that Congress may define or expand constitutional rights by statute. The Court of Appeals' reasoning turns state conduct that this court in *Browning* held was constitutional-discriminatory taxation of railroads-into unconstitutional state conduct. The Court of Appeals' decision on this issue is clearly contrary to the prior decisions of this Court as is the Court of Appeals' decision in *Oregon Short Line*. Given the railroads' nationwide use of 49 U.S.C. § 11501 against the States and the failure of the Court of Appeals to follow the prior decisions of this Court, this Court should grant the Commission's cross-petition for writ of certiorari.

CONCLUSION

If this Court grants a petition for writ of certiorari in No. 99-86, it should also grant this cross-petition. If the petition in No. 99-86 is denied, this cross-petition should also be denied.

Respectfully submitted,

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No. 99-234

IN THE
SUPREME COURT OF THE UNITED STATES

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Cross-Petitioners,

v.

WHEELING and LAKE ERIE RAILWAY COMPANY,
Cross-Respondent.

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Amendment immunizes the Pennsylvania Public Utility Commission from suit under 49 U.S.C. § 11501.

2. Whether individual Commissioners of the Pennsylvania Public Service Commission are subject to suit under 49 U.S.C. § 11501 under the *Ex Parte* Young exception to Eleventh Amendment immunity.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The parties to the proceeding in the court below were plaintiff (cross-respondent herein), Wheeling & Lake Erie Railway Company, and defendant (cross-petitioner herein), the Public Utility Commission of the Commonwealth of Pennsylvania; David W. Rolka, Chairman of the Pennsylvania Public Utility Commission; Joseph Rhodes, Jr., John M. Quain, Lisa Crutchfield, and John Hanger, in their official capacities as members of the Pennsylvania Public Utility Commission. Defendants below also included Scott Township, Pennsylvania, and James P. Mulligan, Chairman of the Board of Commissioners of Scott Township, Pennsylvania.

Cross-respondent, Wheeling & Lake Erie Railway Company, is an Delaware Corporation with its principal place of business in Brewster, Ohio. Wheeling & Lake Erie Company is a subsidiary of Wheeling Corporation, the stock of which is not publicly traded.

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I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION OF WHETHER 49 U.S.C. § 11501 ABROGATES STATE SOVEREIGN IMMUNITY AND IS A VALID EXERCISE OF CONGRESS' § 5 POWERS UNDER THE FOURTEENTH AMENDMENT. 6

II. THE JURISDICTIONAL ISSUE ON WHICH THE COMMISSION SEEKS CERTIORARI IS NOT BASED ON A MISSTATEMENT OF LEGAL PRINCIPLES, NOR WOULD A DIFFERENT RESOLUTION OF THIS ISSUE ALTER THE OUTCOME OF THIS CASE. 11

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No. 99-234

IN THE
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PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Cross-Petitioners,

v.

Wheeling and LAKE ERIE RAILWAY COMPANY,
Cross-Respondent.

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

On July 12, 1999, Wheeling & Lake Erie Railway Company ("Wheeling") filed an opening petition for a writ of certiorari in Wheeling & Lake Erie Railway Company v. Pennsylvania Public Utility Commission, et al., United States Supreme Court, Case No. 99-86. On August 6, 1999, the Pennsylvania Public Utility Commission ("Commission") and its members, respondents in Case No. 99-86, filed a conditional cross-petition for writ of certiorari in Pennsylvania Public Utility Commission, et al. v. Wheeling & Lake Erie Railway,

United States Supreme Court, Case No. 99-234. Wheeling responds as follows to the conditional cross-petition of the Commission:

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 141 F.3d 88 (3d Cir. 1998), and is reproduced in the Appendix to Wheeling's opening petition in Case No. 99-86 ("App.") at App. 1 through 46. The unreported opinion of the United States District Court for the Western District of Pennsylvania which adopted the Magistrate Judge's Report and Recommendation is reproduced at App. 47 through 53. The Report and Recommendation of the Magistrate Judge of the United States District Court for Western District of Pennsylvania is reproduced at App. 54 through 76.

JURISDICTIONAL STATEMENT

Jurisdiction of the United States District Court for the Western District of Pennsylvania was based upon 49 U.S.C. § 11501, and 28 U.S.C. § 1331. Jurisdiction of the United States Court of Appeals for the Third Circuit was based on 28 U.S.C. § 1291.

The order and judgment of the Court of Appeals were entered March 31, 1998. A timely Petition for Rehearing was filed by Wheeling on April 13, 1998. Wheeling's Petition for Rehearing was denied April 15, 1999. A copy of the order denying Wheeling's Petition for Rehearing is reproduced at App. 74 through 76.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), codified in 1978 at 49 U.S.C.§ 11503, and recodified in 1995 at 49 U.S.C. § 11501.

The language of 49 U.S.C. § 11501 as codified differs from the language of Section 306. Neither the 1978 nor 1995 codification can be construed as making any substantive change to the meaning of Section 306. *See*, Pub. L. No. 95-473, § 3(2), 92 Stat. 1466 (1978); Burlington Northern RR v. Oklahoma Tax Comm., 481 U.S. 454, 457 n.1 (1987) (1978 codification), and H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 193 (1995) (1995 codification). Section 306 is reprinted at App.77 through 80; the provisions of 49 U.S.C. § 11501 are reprinted at App. 81 through 83.

Generally, § 11501 prohibits state tax discrimination against rail carriers subject to the jurisdiction of the Surface Transportation Board. §§ 11501(b)(1) through (b)(3) prohibit various forms of discriminatory state property taxation, and § 11501(b)(4), which is the focus of this litigation, prohibits states from imposing "another tax that discriminates against a rail carrier...." § 11501(c) expressly confers jurisdiction on federal district courts to prevent violations of the Act, notwithstanding 28 U.S.C. § 1341, amount in controversy, or

citizenship of the parties.

STATEMENT OF THE CASE

Wheeling adopts by reference its Statement of the Case as set forth at pages 3 through 8 of Wheeling's opening petition in Case No. 99-86. Wheeling supplements that Statement with the following facts relevant to the Commission's conditional cross-petition:

By its terms, Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 is directed against a "State, a political subdivision of a state, or a governmental entity or person acting on behalf of such State or subdivision." (Section 306, App. 77.) 49 U.S.C. § 11501, the recodified version of Section 306, is similarly directed against "a State, subdivision of a State, or authority acting for a State or subdivision of a state." [§11501(b), App. 81.] § 11501 prohibits not only the "assessment" of a discriminatory tax, but also the "levy or collection" of a discriminatory tax. (App. 77-78; 82.)

Notwithstanding the Commission's Order directing Wheeling to pay three percent of the construction cost of the Scott Township highway bridge and fifteen percent of future maintenance costs (exclusive of snow and ice removal), Wheeling did not pay the assessment. Instead, before the Commission's Order became final under Pennsylvania law, Wheeling filed suit in federal court against the Commission and its individual members seeking to enjoin the further assessment, levy or collection of the assessment under 49 U.S.C. § 11501. The district court granted the requested

injunction and, as of the date of this Response, Wheeling has not paid the assessment.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION FOR CERTIORARI

Wheeling's petition for rehearing and suggestion for rehearing *en banc* in the United States Court of Appeals for the Third Circuit was denied April 15, 1999. The time for petitioning for certiorari with respect to that decision expired July 15, 1999. The Commission did **not** petition for certiorari prior to that date, but rather filed a conditional cross-petition for certiorari under Rule 12.5 of the Rules of this Court on August 6, 1999. Under Rule 13.4 of the Rules of this Court, the Commission's conditional cross-petition for certiorari cannot be granted unless Wheeling's petition for certiorari is also granted.

Even if Wheeling's petition for certiorari is granted, however, the Commission's conditional cross-petition should be denied for the following reasons:

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE QUESTION OF WHETHER 49 U.S.C. § 11501 ABROGATES STATE SOVEREIGN IMMUNITY AND IS A VALID EXERCISE OF CONGRESS' § 5 POWERS UNDER THE FOURTEENTH AMENDMENT.

The Commission argues the Majority's exercise of jurisdiction in this case is contrary to recent decisions of this

Court in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)("Seminole Tribe"); City of Boerne v. Flores, 521 U.S. 507 (1997)("City of Boerne"); and Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank, _____ U.S. _____ 119 S.Ct. 2219 (1999)("College Savings Bank"). (Comm. Cross-Pet., pp.8-11.) These decisions stand for the proposition that Congress may not abrogate state sovereign immunity nor subject states to suit in federal court unless Congress acts pursuant to its Fourteenth Amendment enforcement powers. The Commission contends that, in enacting 49 U.S.C. § 11501, "Congress failed to identify State conduct violating the Fourteenth Amendment's substantive provisions," and that Congress was therefore powerless to subject state agencies, such as the Commission, to suit in federal court under § 11501. (Comm. Cross-Pet., p.10.)

The Commission raised this argument for the first time in the Third Circuit and the Majority rejected it, holding:

> It is evident to us that Congress recognized the potential for state and local taxing authorities to discriminate against railroads in violation of their Equal Protection Rights under the Fourteenth Amendment. We conclude that Congress had the power, pursuant to §5 of the Fourteenth Amendment, to promulgate section 11501, and did so to protect the railroads. Therefore, Congress validly abrogated Eleventh Amendment immunity, and the district court properly exercised jurisdiction over this lawsuit.

(App. 12.)

The Majority is not alone. The Ninth Circuit Court of Appeals reached precisely the same conclusion in Oregon Short Line Railroad v. Department of Revenue, 139 F.3d 1259 (9th Cir. 1998). Relying on its own analysis of the legislative history of §11501 - as well as this Court's summary of the purposes of §11501 set forth in Dept. of Revenue v. ACF Industries, Inc., 510 U.S. 332, 336 (1994) - the Ninth Circuit stated: "[I]t would take an unusual amount of pertinacity to cling to the notion that Congress could not enact §11501 pursuant to its power under the Fourteenth Amendment." 139 F.3d at 1267. The Ninth Circuit also rejected the argument that §11501 fails the test of City of Boerne, which requires that "the object of valid §5 legislation must be the carefully delimited remediation or prevention of constitutional violations." College Savings Bank, 119 S.Ct. at 2224. The Ninth Circuit concluded §11501 is "an enactment to enforce the equal protection clause, is consistent with the Constitution, is adapted to its ends, and does not provide remedies which are disproportionate to the desired goal of eliminating discrimination." 139 F.3d at 1267. This holding is also consistent with the holding of the Majority below. (*See*, App. 14.)

The Commission cites Nashville, Chattanooga and St. Louis Railway v. Browning, 310 U.S. 362 (1940), for the broad proposition that, under this Court's prior jurisprudence, "discriminatory taxation of railroads [does] not violate the equal protection clause of the Fourteenth Amendment." (Comm. Cross-Pet., p.9.) Based on Browning, the Commission

argues that Congress could not have "remediate[d] unconstitutional discrimination when this Court had already held that discriminatory taxation against railroads was constitutional." (Comm. Cross-Pet., p.10.)

The Commission's argument overstates the scope of Browning (which holds that the mere over-assessment of railroad property for ad valorem tax purposes does not constitute an equal protection violation), and ignores other Supreme Court decisions in which railroads obtained relief from discriminatory state taxation under the Fourteenth Amendment. *See, e.g.*, Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Southern Ry. Co. v. Greene, 216 U.S. 400 (1910); and Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907). *See also*, Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336 (1989).

The Ninth Circuit specifically rejected a similar argument in Oregon Short Line, stating:

> At the fringes, some classifications prohibited by §11501 might have been sustainable against an equal protection challenge in the Supreme Court (*See* Browning, 310 at 368-70 60 S.Ct. at 972 (holding that when a State's method of taxation of railroads and other utilities was historical and not invidious there was no equal protection violation). But, given the problems it saw, Congress could eliminate all railroad specific discrimination, even if it eliminated more practices than the Supreme Court itself

> would have done. *See*, Clark [v. California, 123 F.2d 1267, 1270 (9th Cir. 1997)]. Therefore, §11501 is a Constitutionally sound enactment, which abrogated the State's Eleventh Amendment immunity, because Congress could draw its authority from §5 of the Fourteenth Amendment.

139 F.3d at 1267. The Majority below reached the same conclusion in this case, holding that Congress' power under §5 of the Fourteenth Amendment was **not** limited to protecting those persons who had already been identified as deserving of protection under Fourteenth Amendment jurisprudence.[1] (App. 12-13.)

Thus, there being no conflict among the federal circuits with respect to Congress' power to abrogate state sovereign immunity under §11501, the jurisdictional issue raised by the Commission does not meet the criteria for certiorari under Supreme Court Rule 10(a).

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[1]During the debates on § 11501, Congress was indisputably aware of how federal courts had enforced Fourteenth Amendment limitations on the states' power to impose discriminatory taxes on railroads, *see, e.g.*, S. Rep. No. 630, 91st. Cong., 1st Sess. (1969), p.7, and made specific findings with respect to the deleterious effects of discriminatory state taxation of railroads. S. Rep. No. 630, p.3.

II. THE JURISDICTIONAL ISSUE ON WHICH THE COMMISSION SEEKS CERTIORARI IS NOT BASED ON A MISSTATEMENT OF LEGAL PRINCIPLES, NOR WOULD A DIFFERENT RESOLUTION OF THIS ISSUE ALTER THE OUTCOME OF THIS CASE.

The error of which the Commission complains arises from an-alleged misapplication by the Majority of a properly stated rule of law, *viz*, Eleventh Amendment immunity principles set down in Seminole Tribe, *supra*, and City of Boerne, *supra*. The Commission makes no assertion that the Third Circuit mis-stated these legal principles, but merely argues that the Third Circuit "[mistook] what is a substantive change in Constitutional rights for a remedial statutory enforcement of existing Constitutional rights." (Comm. Cross-Pet. p.11.) Asserted misapplication of a properly stated rule of law is, however, "rarely" grounds for granting a petition. *See*, Supreme Court Rule 10.

Furthermore, the jurisdictional issue raised by the Commission would **not** require dismissal of this case even if this Court were to grant the Commission's petition and conclude the Majority had erred. As the Dissent recognized, "Wheeling's claim for prospective declaratory and injunctive relief still survives against the individual Commissioners under the doctrine of *Ex Parte* Young - a subject not addressed by the majority." (App. 36.) Thus, the jurisdictional issue presented by the Commission is not outcome-determinative or worthy of certiorari. (*See, e.g.*, 28 U.S.C. § 2111, which provides that the court shall give judgment "on writ of certiorari without regard to errors or defects which do not affect the substantial rights of

the parties.")

Under *Ex Parte* Young, 209 U.S. 123 (1908), a suit challenging the constitutionality of a state official's actions in enforcing state law is not one against the state and is not barred by the Eleventh Amendment, so long as the relief sought is prospective and does not have the effect of an award of damages or restitution against the state. Green v. Mansour, 474 U.S. 68 (1985); Edelman v. Jordan, 415 U.S. 651, 662 (1974). As stated in Green v. Mansour, 474 U.S. at 68:

> The availability of prospective relief of the sort awarded in *Ex Parte* Young gives life to the supremacy clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

In the ninety years since *Ex Parte* Young was decided, federal courts have exercised jurisdiction over state officials to prevent enforcement of state laws that violate the Fourteenth Amendment (as in *Ex Parte* Young itself), or that are otherwise void under the supremacy clause of the United States Constitution. *See, e.g.*, Green v. Mansour, *supra*, (whether state administration of benefits violated the Federal Aid to Families with Dependent Children Act); Ray v. Atlantic Richfield Company, 431 U.S. 151, 156, n.6 (1978)(declining to overrule *Ex Parte* Young in case deciding whether state law conflicts with federal law); Committee to Save Mokelumne River, 13 F.3d, 305 (9th Cir. 1993), *cert denied* 115 S.Ct. 198 (1994)(violation of Clean Water Act).

Although the order which imposed the assessment for accrued construction costs was entered September 23, 1994, Wheeling declined to pay the assessment, and the discriminatory tax of which Wheeling complains has not yet been collected. Under Pennsylvania law, violation of a Commission order is a "continuing offense," 66 Pa. C.S.A. §3301(b), and the Commissioners have broad power to enforce their orders by initiating a variety of administrative and judicial procedures, such as the imposition of substantial fines and the commencement of suits for collection. *See, e.g.*, 66 Pa. C.S.A. §3301(a); 66 Pa. C.S.A. §§501, 502 and 503. The concept of an "ongoing violation" of federal law sufficient to warrant an injunction under *Ex Parte* Young does **not** require that state officials have a continuing relationship with the plaintiff, but merely that they be appropriate officers against whom an injunction (as opposed to a money judgment) can operate. Coakley v. Welch, 877 F.2d 304, 306-07, n.2 (4th Cir. 1989). Just as the state officer in *Ex Parte* Young was enjoined from filing suit to enforce an unconstitutional statute, the Commissioners may be sued to enjoin the further "assessment, levy or collection" of a discriminatory tax by initiating enforcement proceedings. This is what §11501 specifically authorizes, and this is what the district court's permanent injunction provided.

As the Dissent also recognized, the Commission's order also imposed on Wheeling the obligation for **future** costs of maintaining the bridge and, absent an injunction, Wheeling would be required to pay whatever maintenance sums the

Commission ultimately approves.[2] Thus, the §11501 violation complained of by Wheeling is continuing and ongoing, and the individual commissioners were plainly subject to suit under *Ex Parte Young* to enjoin collection of both the principal assessment of construction costs, and whatever future maintenance expenses the Commission may ultimately approve.

CONCLUSION

Wheeling's opening petition in Case No. 99-86 should be granted and, for the foregoing reasons, the Commission's conditional cross-petition for writ of certiorari should be denied.

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[2]The Dissent had some question whether the assessment for bridge construction costs was "prospective or retrospective relief" (App. 46.), but had no doubt Wheeling was entitled to prospective declaratory and injunctive relief with respect to future maintenance costs.

Respectfully submitted,

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